IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA,
AND PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I N D E X

CITATIONS

Cases:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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NATIONAL BLACK MEDIA COALITION, CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA, AND PHILADELPHIA COMMUNITY CABLE COALITION,
PETITIONERS,

V.

MIDWEST VIDEO CORPORATION, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The National Black Media Coalition, Citizens For Cable Awareness In Pennsylvania, and Philadelphia Community Cable Coalition respectfully petition this Court to issue a writ of certiorari to the judgment of the United States Court of

Appeals for the Eighth Circuit in Midwest Video Corporation v. Federal Communications Commission No. 76-1496 and No. 76-1839 decided February 21, 1978.

OPINIONS BELOW

The Opinion of the Court of Appeals, dated February 21, 1978, has not yet been officially reported. The Federal Communications Commission's Report and Order: the Cable Television Channel Capacity and Access Channel Requirements is reported at 59 F.C.C. 2d 294 (1976). The FCC's Memorandum Opinion and Order, denying petitions for reconsideration of the Report and Order is reported at 62 F.C.C. 2d 399 (1976).

The full texts of the opinions below are printed in the separate appendix to the Petition for Writ of Certiorari filed by the FCC in these cases on May 4, 1978, FCC v. Midwest Video Corporation, et al. (No. 77-1575). For convenience, references herein will be to the FCC's Appendix ("FCC App.").

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. A stay of mandate was granted by the court by order dated April 4, 1978 [FCC App. D]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 28 U.S.C. §2350(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments are set forth at the end of this petition.

Sections 1, 2(a), 3(h), 303(g), 303(r) and 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151, 152(a), 153(h), 303(g), 303(r) and 307(b), are set forth in FCC App. E.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's rules which require access to cable channels for public, educational, governmental and lease uses on cable television systems that transmit over-the-air broadcast signals and have 3500 or more subscribers, are within the Commission's regulatory authority granted in the Communications Act of 1934, as amended.

2. Whether the Commission's regulatory scheme for cable television access uses is prohibited by the First or Fifth Amendment.

STATEMENT

This petition seeks review of an opinion and judgment of the Eighth Circuit Court of Appeals that the Federal Communications Commission lacks authority to promulgate rules requiring access to cable television systems for public, educational, governmental, and lease uses.

The access rules were initially promulgated by the Commission as another means of fostering local expression. In fact, the access uses were tied to the cable program origination rule upheld in U.S. v. Midwest Video Corporation 406 U.S. 649 (1972) because it was assumed that the same equipment would be used for both kinds of programming. With the elimination of the mandatory origination requirement in 1974 (49 F.C.C.

2d 1090) the access rules became the sole means of providing local outlets for local expression on a small part of the abundant channels which cable technology provides. This petition is premised on the assertion that the Eighth Circuit was faced here with essentially the same exercise of regulation that it was faced with when it set aside the origination rules. Petitioners will demonstrate that the circuit court was similarly incorrect in its action in setting aside the access rules as it was found to be by this Court in Midwest Video in setting aside the origination rule.

A. Cable Television Systems

From the earliest beginnings of cable television regulation by the Federal Communications Commission it

was evident that cable systems were part of interstate communications by wire. Carter Mountain Transmission Corporation v. FCC, 321 F.2d 359 (D.C. Cir. 1963). Coaxial cable, the kind of cable currently employed by cable or CATV systems to transport video signals, is capable of carrying television or radio broadcast signals to a subscriber relatively free of interference. Television signals are received off-the-air at the system antenna. Through the use of a conventional television antenna, or, through the use of microwave relay systems or satellite, signals may be imported from remote television markets.[1/] Once

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1/ The Commission's rules now permit to some extent the importing of signals from any region of the country to another. 47 C.F.R. §76.61(b) (1976). To facillitate this (cont. on next page)

received at the system antenna or "head-end," the broadcast signals are carried simultaneously over the air to the subscriber. The subscriber then selects the channel to be viewed on his television set.[2] A system

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1/ (cont. from previous page) movement of television signals a band of frequencies have been set aside specifically for use by cable systems. 47 C.F.R. §78.18 (1976) reserves from 12.70 to 12.95 GHz for this use. Similarly, frequencies are assigned to cable television satellite earth stations that will receive programming via satellite. See 47 C.F.R. §§25.103, 25.202 (1976).

2/ The number of television channels that can be delivered to the home is ever changing. See Jones, Patents: Versatile Cable for Light Waves, N.Y. Times, March 11, 1978, at 31, col. 1.

is not limited to supplying over-the-air broadcast signals. Other channels on a cable system can be leased by the CATV operator to anyone desiring to have special programming carried to the system's subscribers. The program can be video tape recorded and transmitted at the CATV head-end, or it can originate "live," to be carried by closed circuit means (i.e. cable and terrestial or satellite relay to the head-end for transmission).

B. The Access Rules

The Federal Communications Commission's access scheme embodied in the rules under review was initially promulgated in 1972 and applied only to cable television systems[3/] operating

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3/ The Commission's cable television regulations apply only to those cable television systems (cont. on next page)

in a community located in whole or in part within the 100 largest television markets. Cable Television Report and Order, 36 F.C.C. 2d 141, 189, 244 (1972). The current access rules apply to cable television systems having 3500 or more subscribers regardless of their proximity to a television market.[4/] Additionally, the number of access channels required has been reduced by the amended rules.

In general, the rules (47 C.F.R. §§76.252, 76.254, 76.256, 76.258 and

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3/ (cont. from previous page) that distribute signals of one or more television station to subscribers. 47 C.F.R. §76.5(a) (1976). See Riverside Cable Corporation, 42 F.C.C. 2d 783 (1973).

4/ Midwest Video Corporation, the petitioner in the Eighth Circuit, operates cable television systems that have 3500 or more subscribers.

76.305 [FCC App. 168-177, 202-203]) provide that cable television systems which have 3500 subscribers or more and are built after March 31, 1977 must be technically capable of providing radio bandwidth sufficient to accomodate 20 television channels. 47 C.F.R. §76.252 [FCC App. 168]. If the cable system is now in existence the operator has until June 21, 1986 to achieve the 20 channel capability.

Then if there is sufficient demand, the cable system must dedicate portions of the required radio bandwidth to specific video uses designated in the Commission's access rules. Assuming adequate demand and sufficient channel space, the cable system must provide: (1) a "public access channel" which is restricted to non-commercial uses on

a first come, non-discriminatory basis; (2) an "educational access channel" for use by educational authorities; (3) a "local government access channel" for local government uses; and (4) a "leased access channel" for leased access uses. 47 C.F.R. §76.254(a) (1976) [FCC App. 169-170]. However, until there is sufficient demand for the designated uses, or if an existing system before 1986 lacks technical capability, only one channel needs to be provided to serve all the designated access uses. When that channel is not in use for designated access, the system can use the channel or channels for other broadcast or non-broadcast purposes. 47 C.F.R. §76.254(b) (1976) [FCC App. 202]. Existing systems without adequate bandwidth need only provide

channels to the extent possible. 47 C.F.R. §76.254(c) (1976) [FCC App. 171].

To assist in the development of public access uses, the cable operator must have available equipment for local production and presentation of cablecast programs. 47 C.F.R. §76.256(a) (1976) [FCC App. 172].[5/] The Commission also assumes that the operator will have a room or part of a room on a part-time basis for program production [FCC App. 146].[6/]

5/ While cable operators with 3500 subscribers have not been required to originate programming since 1974, they must continue to provide as they always did, access production equipment. Cable Television Service, 49 F.C.C.2d 1090 (1974).

6/ Additionally, the employment of the channel for governmental and educational uses is to be free for five years after the system first offers channel time for such cablecasting purposes
(continued on next page)

C. This Court's Consideration of the FCC's Jurisdiction Over Cable Television

On two previous occasions the Court has considered the FCC's authority to regulate cable television within the Communications Act of 1934. United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (Southwestern); United States v. Midwest Video Corporation, 406 U.S. 649 (1972) (Midwest Video).

6/ (cont. from previous page) 47 C.F.R. §76.256(c)(1) [FCC App. 173] and, public access uses of channel space are always to be made available without charge. 47 C.F.R. §76.256(c)(2) [FCC App. 173]. However, the equipment, personnel, and production of all access programming is subject to reasonable charges, except for the first five minutes made for live "public access" programming which is to be free. 47 C.F.R. §76.256(c)(3)[FCC App. 173]. Of course, leased uses by definition, must pay for both the channel and production costs. The public, educational, and leased access uses - but not the governmental uses - are subject to operating rules. 47 C.F.R. §76.256(d) [FCC App. 173-175]. (cont. on next page)

In Southwestern, the scope of the Commission's regulatory responsibilities was found to be ". . . to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" 392 U.S. at 168 [footnotes omitted]. Further, the Court pointed out that it was uncontroverted that cable television systems are within the statutory definition of "communication by wire or radio," 47 U.S.C. §§153(a), (b), and that there is no ". . . doubt that CATV systems are engaged in interstate communication."

6/ (cont. from previous page) The Commission has also prohibited state or local entities from exceeding the federal requirements without express Commission authorization. 47 C.F.R. §76.258 [FCC App. 175-176].

Ibid. The Court characterized cable systems' interstate elements as being ". . . a stream of communication [which] is essentially uninterrupted and properly indivisible." Id. at 169.

The petitioners in Southwestern argued that while cable systems came within the definitions and authority of the Communications Act, they could be regulated only if they were common carriers within Title II of the Act or broadcasters within Title III. They urged further that if, as is true of cable television, it possessed hybrid characteristics of both, then it could elude the Act's grasp.

The Southwestern Court concluded that the Act could not be construed so restrictively, and ". . . found no reason to believe that §152 does not,

as its terms suggest, confer regulatory authority over 'all interstate. . . communication by wire or radio.'" Ibid.

This Court then recognized the legitimacy of the Commission's objectives in exercising its authority over cable television as follows:

> Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C. §307(b) . . . . The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have

> at least one television station as an outlet for local self-expression." Id. 392 U.S. at 173-174.

While the Commission's concern in Southwestern was with the potential harm cable television might cause to existing local service, this was not the case in Midwest Video. There, the Court agreed with the Commission that it need not limit its regulation of cable to "'. . . avoidance of adverse effects,'" but that its authority extended to "'. . . requiring CATV affirmatively to further statutory policies.'" 406 U.S. at 653, 664 [quoting Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417, 422 (1968)].[7/] At issue in

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7/ The Court, reiterated this view again in its opinion citing the preceding analysis from Southwestern, by stating that (cont. on next page)

Midwest Video was whether the Commission could require cable systems to originate programming. The Court then considered if the Commission could reasonably concern itself with whether a CATV operator "satisfactorily meets community needs within the context of [his] undertaking." Id. at 670. The Court concluded that this was a valid Commission concern and that the requirement for cable systems to originate programming was a reasonable exercise of its interest in cable systems.

D. The Eighth Circuit Decision

The Eighth Circuit here, however, in determining whether the access rules met a similar Commission concern for

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7/ (cont. from previous page) the Commission's authority to regulate CATV was "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." Id. at 667.

local community needs, found the rules "designed to force [cable systems] into activities not engaged in or sought, [and into] activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting." [FCC App. 28]. The access regulations, the Court believed, would "profoundly [alter] the obligations of a private business, requiring a fundamental change in its nature. . .," [FCC App. 44]. In sum, the Court was unable to find any statutory authority, valid regulatory objective, or lawful purpose to the rules. The court stated in dictum, that had the case not been decided on the jurisdictional issue, the rules would fail because they would be unconstitutional under the First and Fifth Amendments.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's opinion and holding setting aside the cable access rules for lack of statutory authority is in direct conflict with U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968) and U.S. v. Midwest Video Corp., 406 U.S. 649 (1972). It is also apparent that the Eighth Circuit's determination is inconsistent with other circuits' readings of those cases.

Furthermore, the circuit court's view of the FCC's authority to regulate cable systems, if allowed to stand, would severely handicap the Commission in regulating the developing technology of cable television in the public interest. Additionally, the court's view that the access rules violate the

First Amendment raises a novel and important First Amendment question.

For the reasons which follow, the petitioners urge that the Court grant certiorari, and that it summarily reverse the circuit court on its jurisdictional holding.

I.

The Eighth Circuit misinterprets the scope of the Commission's authority over cable systems as stated by this Court in the Southwestern and Midwest Video cases. Specifically, it is the circuit court's view [FCC App. 20-21] that the statute provides no specific grant of authority to the FCC to regulate cable television systems. Instead, the circuit court holds that decisions of this

Court have limited the Commission's authority over cable systems to such an extent that only regulations protecting existing television signals or requiring cable systems to act in a manner similar to television stations are permissible.[9/] This view is flatly contrary to this Court's reading of the Act in Southwestern

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9/ The circuit court later dismisses any possible basis for regulation of cable systems, presumably even that approved in Midwest Video and Southwestern, when it concludes that "[i]n retransmitting broadcast programs, cable systems use no 'limited and valuable part,' or any other part, of the federal public domain" [FCC App. 41]. The court makes this finding despite the fact that Midwest Video and Southwestern, if they stand for anything, stand for the proposition that cable systems are part of interstate communications by wire and that they make use of broadcast signals and radio frequencies which do belong to the public, and that their use incurs certain obligations to meet the Act's objectives.

that the Act includes within its regulatory ambit transmission of signals, pictures, and sounds of all kinds whether by radio or cable, and authority to regulate cable systems is within the Commission's responsibilities found in other sections of the Act. Id. 392 U.S. at 172.[10/]

The Eighth Circuit found no more merit to the Commission's objective to increase local self-expression through access channels than it did when it reviewed the origination rule. However, faced with this Court's approval of increased outlets for community self-expression as a valid objective in Midwest Video, the circuit court stated

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10/ The Southwestern Court also dismissed the notion that activities not mentioned specifically in the Act were not within the Commission's power. Ibid.

that unless the operator both controlled the programming and could charge for it, access origination did not serve the same objective as origination initiated by the cable system operator [FCC App.29-30]. Outlets, if not controlled by the operator, the court indicated, were not supported by the statute; were divorced from over-the-air broadcasting; and amounted to "a crusade to create a public right to use cable facilities" [FCC App. 32-39 (emphasis in original)]. In actual fact, the circuit court never examined the relevant statutory sections relied upon by the Commission and this Court in Midwest Video.[11/]

11/ The Midwest Video Court held that the "composition of radio traffic" (Citing National Broadcasting Co. v. United States, 319 U.S. 190, 215-216.) is up to the Commission, and that the widest possible dissemination of information from diverse (cont. on next page)

The circuit court also argued that cable regulations must be analogous to television broadcast regulations. Thus, the court reasoned, if the Commission cannot require over-the-air broadcasters to provide channels for access uses, then it cannot validly justify this regulation of cable. This argument was dismissed as being without merit in Midwest Video.[12/]

11/ (cont. from previous page) sources is a basic tenet of national communications policy. 406 U.S. at 668. Moreover, none of the statutory sections relied upon by the Court in Midwest Video, §§303(g) and 307(b), even allude to the distinctions raised by the circuit court.

12/ There the Court stated: "CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking." 406 U.S. at 670.

The Eighth Circuit should have focused on whether access to some of cable's multiple channels is a legitimate means to ensure that cable systems satisfactorily meet community needs.[13/]

13/ The circuit court also believed the access requirements to be common carrier regulations prohibited by 47 U.S.C. §153(h), which provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." The court's application of this section makes no mention of the hybrid nature of cable. If the circuit court had made a valid inquiry into the common carrier nature of the access rules it would have found that they fail to provide mandatory access. In fact, access uses have third priority to cable channels after broadcast signals and pay cable programming by the operator; they are subject to rules of operation in which the system operator exercises some control; and they are limited to four channels no matter how many channels are available on the system and no matter how great the demand. See Frontier Broadcasting (cont. on next page)

Additionally, the Eighth Circuit's view of the Commission's authority over cable systems is contrary to three other circuits' assessment of the holding of Midwest Video: National Association of Regulatory Utility Commissioners v. F.C.C., 533 F.2d 601, 615 (D.C. Cir. 1976) ("Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer's screen. . . 'suitably diversified programming' is within the ancillariness standard [applied to cable]."); Brookhaven Cable TV, Inc. v. Kelly, Nos. 77-6165 and 77-6157 (2nd Cir.) decided March 29,

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13/ (cont. from previous page) Co. v. Collier, 24 F.C.C. 251, 254 (1958). (This is not to say, however, that were these restrictions not present that 3(h) would prohibit access uses. Petitioners argued below that these limitations are unreasonable and unnecessary, given the hybrid nature of cable systems.)

1978, Slip Op. at 2164 (Approved the Commission's policy permitting pay cable to be free of price restraints as being within the program diversity standard of Midwest Video.); Home Box Office v. FCC, 567 F.2d 9, 46 n. 81 (D.C. Cir. 1977) cert. denied 98 S. Ct. 111 (Noted that this Court indicated in Midwest Video that the Commission could direct sharing of cable channels for access purposes.); and American Civil Liberties Union v. FCC, 523 F.2d 1344, 1351 (9th Cir. 1975). (Made the same observation as Home Box Office about whether access channels were permissible regulation within Midwest Video.)

II.

The circuit court stated that "... it [was] unnecessary to rest [its] decision on constitutional grounds..." and it there-

fore "... decline[d] to do so" [FCC App. 64]. But the court then stated that while it found "... it unnecessary to resolve the serious constitutional issues raised ... potential incursions into sensitive constitutional rights..." require careful scrutiny [Id. at 65]. The court then abandoned its obligation to avoid reviewing unnecessary constitutional questions and indicated that the rules would be impermissible on the present record [FCC App. 74]. The court addressed three constitutional issues: whether cable systems are entitled to the same First Amendment rights as "other private media"; whether in a First Amendment context "compelled" access to cable facilities is different from "compelled" access to broadcast facilities; and whether the cable access operating rule

which prohibits obscenity is a prior restraint. In spite of its concession that it was without the Commission's views on the matter, the court reasoned that Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), would govern the resolution of the questions posed, necessitating a finding that the cable access rules are violative of the First Amendment.

A key to the circuit court's analysis of the First Amendment issues is its assessment that cable systems are "private media" like newspapers or movie houses [FCC App. 72]. However, if the Court should find that the Commission has jurisdiction to require access channels, the circuit court would have to conclude that cable television is not private media and that Tornillo

is inapplicable. See Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); CBS v. Democratic National Committee, 412 U.S. 94 (1973). Accordingly, the present status of this case, in light of the Eighth Circuit's treatment of the First Amendment questions, necessitates this Court's review of those issues in addition to the challenge to the Commission's jurisdiction.

Finally, of importance to reviewing the lower court's consideration of this issue is the Commission's current reconsideration of the propriety of the obscenity restrictions addressed by the Eighth Circuit. Currently, the rule is before the Commission following a remand from the District of Columbia Circuit and the Commission's actions on remand may very well moot the need for

this Court's consideration of the First Amendment issue presented by the obscenity rule. ACLU v. FCC, No. 76-1695 (D.C. Cir.) remanded August 26, 1977 (where the Commission gave every indication to the court that it was considering repealing the rule which requires that the operator have some control over access channel content).

CONCLUSION

When viewed in light of this Court's approval of the Commission's jurisdiction over cable television in Southwestern and Midwest Video, the Eighth Circuit was clearly incorrect in finding that the cable access rules are outside the FCC's authority. Further, it is an issue which other circuits, in applying those cases to analogous questions, have resolved in a manner diametrically

opposed to the Eighth Circuit's view. While there is no further need for the Court to give extensive consideration to the jurisdictional issue again, certiorari should be granted and the Eighth Circuit's opinion should be summarily reversed on the jurisdictional issue. If the decision is allowed to stand, the promise that cable offers to alleviate spectrum scarcity will be outside the Commission's jurisdiction, and this Court's refusal to review the instant cases would serve as a clear indication to other circuits that cable regulations which forward the long held communications objective to enlarge local outlets are outside the FCC's authority.

Such a result would undoubtedly lead to myriad variations of local and

state regulations thereby frustrating a new nationwide cable communications service.

For the foregoing reasons the petitioners respectfully request that the Court grant certiorari and summarily resolve the jurisdictional issue.*

Respectfully submitted,

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* The petitioners wish to acknowledge the participation and assistance in the preparation of this petition of Gary Meyer, student, UCLA School of Law.

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Midwest Video Corporation v. Federal Communications Commission*, 571 F.2d 1025 (8th Cir. 1978) (FCC App. A).[1] The court granted a stay of its mandate on April 4,

[1] Throughout this brief, appendix references (FCC App.) are to the appendix submitted by the Federal Communications Commission in Case No. 77-1575, U.S. Sup. Ct., a petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit relating to the same decision below. The FCC appendix has been cited by the petitioner in Case No. 77-1662.

1978. (FCC App. D). The decision of the Federal Communications Commission is reported as *Cable TV Capacity and Access Requirements,* 59 F.C.C.2d 294 (1976), reconsideration denied, 62 F.C.C.2d 399 (1976). (FCC App. B and C).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) and 28 U.S.C. §2350(a).

STATUTES AND RULES INVOLVED

This case involves the jurisdiction of the Federal Communications Commission to promulgate changes in 47 C.F.R. §§76.252, 76.254 and 76.256. No statutory provisions sustain the action of the Federal Communications Commission. However, Petitioner relies upon 47 U.S.C. §§151, 152(a), 153(h), 303(g), 303(r) and 307(b) for authority (FCC App. E).

COUNTERSTATEMENT

The court below set aside rules of the Federal Communications Commission promulgated in *Cable TV Capacity and Access Requirements,* 59 F.C.C. 2d 294 (1976) [*1976 Report*], amending and relaxing the agency's prevailing rules regarding access channel obligations[2] of cable television operators. In 1972, the Commission required that all cable systems in the top one hundred major television markets should provide, before March 31, 1977, the following: 1) a capacity of twenty program channels; 2) sufficient non-broadcast bandwidth for each broadcast channel; 3) technical capacity for non-voice return communications; 4) four non-broadcast

[2] As used herein "access" refers to the use of cable television facilities by persons other than the owner or operator of the cable system.

channels, one each for public, educational, local government and leased channel use; 5) public access channels, the number of which was to be determined by demand; and 6) adequate facilities for production of access programming. *Cable Television Report and Order,* 36 F.C.C. 2d 143 (1972).

After recognizing that the technological and financial burdens of its rules on cable operators frequently were not justified by demand for the services, the Commission, within three years of issuing these rules, instituted a rule-making proceeding[3] which resulted in the report and order reviewed by the court below. The Commission's *1976 Report* reflected a determination that the uncertain demand for access by the public did not justify the 1972 rules, which had the effect of increasing costs to subscribers. Consequently, the Commission amended its rules to require cable systems with 3500 or more subscribers to offer, as a minimum level of service, access for the four categories of uses and for general public access on but a single access channel. Greater access was required only if the system both had the capacity and experienced greater demand for more access use than it could accommodate on a single channel. The Commission also extended the deadline for cable systems to meet the twenty channel capacity requirement to June 21, 1986.

The *1976 Report* refashioned the perspective of the access rules, applying them not to all major market cable systems but to any system with 3500 or more subscribers regardless of the size of the community served. Recognizing that the rules thus applied to only a portion of all cable systems, the Commission reaffirmed its earlier view that local franchising authorities could fix access require-

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[3]Docket No. 20508. *Cable Television Channel Capacity et al.,* 53 F.C.C. 2d 782 (1975).

ments no greater than those imposed by the Commission regardless of the number of subscribers. However, it accepted, for the first time, the principle that local authorities could impose access burdens greater than those set out in the new rules, regardless of the number of subscribers, "upon individual showings and with Commission approval". 59 F.C.C. 2d at 325 (FCC App. 163). On reconsideration of its report and order, the Commission reaffirmed that a local authority could impose greater access obligations on systems within its jurisdiction as long as the requirements could be justified by concrete cost data having a "rational relationship" to the anticipated benefits to cable subscribers. *Cable TV Capacity and Access Requirements*, 62 F.C.C. 2d 399, 402 (1976) (FCC App. 189).

Midwest Video Corporation filed a petition for review of the *1976 Report* with the United States Court of Appeals for the Eighth Circuit on June 15, 1976. *Midwest Video Corporation v. Federal Communications Commission, et al.* (Case No. 76-1496). The American Civil Liberties Union filed a petition for review of the same order in the United States Court of Appeals for the District of Columbia Circuit on June 17, 1976. *American Civil Liberties Union v. Federal Communications Commission, et al.*, (Case No. 76-1549). The two cases were consolidated by an order of the United States Court of Appeals for the Eighth Circuit on October 21, 1976, and designated as Case Nos. 76-1496 and 76-1839. The decision of the court below was filed on February 21, 1978.

The Eighth Circuit set aside the 1976 rules relating to cable channel capacity, equipment and public access on the ground that the Commission had no statutory jurisdiction over these matters and, as a consequence, the agency had no power to promulgate the rules, either

initially or as amended in 1976. The court found that no provision of the Communications Act of 1934, as amended,[4] justified the Commission's exercise of regulatory authority over these aspects of cable operation.

In addition, the court held that the Commission had failed to demonstrate that the rules under review were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting", the statutory scope of power over cable systems previously recognized by the United States Supreme Court. *United States v. Southwestern Cable Co.*, 392 U.S.157, 178 (1968); *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972). The court below examined the Commission's reasons for promulgating the access rules, reviewed the objectives of the rules and, applying the prevailing legal standard to the Commission's actions, concluded that "(t)he Commission has not shown the slightest nexus between the *1976 Report* access rules and its responsibilities for broadcast television." 571 F.2d at 1038 (FCC App. 28). Without that nexus, the court determined, the access rules and the associated channel capacity and rebuild rules should be set aside.[5]

The court below issued a stay of mandate in the case on April 4, 1978. (FCC App. D). The petitioner in Case No. 77-1575, U.S.Sup. Ct., the Federal Communications Commission, filed its petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit on May 4, 1978. Two other petitions for writ of certiorari to

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[4] 47 U.S.C. § § 151 *et seq.*

[5] Two of the three judges discussed constitutional aspects of the issues raised before the court, but they expressly declined to base their disposition of the case on those grounds. 571 F.2d at 1052 (FCC App. 64).

the Eighth Circuit arising out of the decision below were timely filed. *American Civil Liberties Union v. Federal Communications Commission, et al.*, Case No. 77-1648, (filed May 19, 1978), and *National Black Media Coalition et al. v. Midwest Video Corporation, et al.*, Case No. 77-1662 (filed May 22, 1978). Midwest Video Corporation has filed a brief in opposition to all three petitions for writ of certiorari and Respondents adopt the arguments made therein.

REASONS FOR DENYING PETITION

I. Constitutional Issues

In setting aside the Commission's mandatory channel capacity, equipment and access rules solely on jurisdictional grounds (FCC App. 91), a majority of the lower court stated (FCC App. 64, 74, 77) that it was "unnecessary to rest [its] decision on constitutional grounds", and specifically declined to do so (FCC App. 64). The Commission, in its earlier filed petition, has acknowledged (FCC Pet. 13) that the lower court opinion was not decided on constitutional grounds.

Should access to cable television be required in the future by non-federal regulation, the effect of such regulations may then be evaluated in constitutional terms. At that time, these constitutional issues will be properly before the Court. Therefore, denial of the petition for certiorari[6] is appropriate under the Court's long established policy of both not anticipating constitutional questions, *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33 (1885); *see generally, Ashwander*

[6]Petitions filed by the Federal Communications Commission (FCC 15-16) and the American Civil Liberties Union (ACLU 13-27) also assert that the lower court opinion involves important constitutional questions. The reasons discussed herein for denying certiorari apply equally to the arguments of all petitioners.

v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), and declining to decide questions of a constitutional nature unnecessary to a decision in a case. *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Burton v. United States*, 196 U.S. 283 (1905); *Ashwander* (Brandeis, J., concurring), *supra*.

II. Congressional Action

More importantly, this case does not merit review by the Court because of current Congressional activity to re-write the Communications Act of 1934. On June 7, 1978, a complete revision of the Act was proposed by the Chairman of the House Communications Subcommittee. H.R. 13015, 124 Cong. Rec. H5231 (1978). Among other things, the bill proposes to completely eliminate federal regulation of cable television. Sec. 102(b)(1). Since 1968, in *United States v. Southwestern Cable Co.*, *supra*, and again in *United States v. Midwest Video Corp.*, *supra*, the Commission has relied upon this Court to establish its jurisdiction over various aspects of cable television through the vehicle of judicial construction. Now petitioner and the Commission appear once again before the Court seeking verification of an expansion of jurisdiction over additional matters involving cable television. The time has come for the Court to exercise restraint and permit Congress to establish a legislative policy in this area.

III. Unified Regulation of Access

The decision below does not relate to an aspect of cable regulation where national uniformity of service is required, a factor considered by the court in *Southwestern* and *Midwest*, *supra*. There has been no showing that unified regulation in the access, channel capacity, and equipment areas is important. In fact, the Commis-

sion's actions in this area suggest that no such unified regulation is necessary. Thus, the Commission's rules, prior to the *1976 Report*, recognized the role of local franchising authorities in adopting channel capacity and access channel requirements in particular non-major markets not covered by the federal rule. In reaffirming its position that such local action continues to be important, the Commission stated its belief (FCC App. 161-62) that "room remains for local authorities to exercise their own best judgment in balancing between the needs of their citizens and the costs which must ultimately be borne by them". The *1976 Report* contemplated access requirements by local franchising authorities which could exceed Commission requirements upon individual showings and with Commission approval. Therefore, the overall perspective of the Commission's actions specifically recognizes that the unified regulation of access does not reach that degree of importance which justifies review by this Court.

CONCLUSION

For the reasons set forth above and in the brief of Midwest Video Corporation, this case does not merit review by this Court. In particular, Congress should be afforded an opportunity to exercise its primary responsibility to define exactly what jurisdiction the Federal

Communications Commission shall have over cable television. It is respectfully submitted, therefore, that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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WESTERN COMMUNICATIONS, INC.
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June 21, 1978

Nos. 77-1575, 77-1648, 77-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSLYVANIA,
AND PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS NATIONAL BLACK MEDIA COALITION, ET AL.

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Nos. 77-1575, 77-1648, 77-1662

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1662

National Black Media Coalition,
Citizens for Cable Awareness in
Pennsylvania, and Philadelphia
Community Cable Coalition,
Petitioners,

v.

Midwest Video Corporation, et al.
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS NATIONAL BLACK MEDIA COALITION, ET AL.

OPINIONS BELOW

The opinion of the court of appeals

is reported at 571 F.2d 1025 (App. A).[1/] The orders of the Federal Communications Commission are reported at 59 F.C.C. 2d 294, reconsideration, 62 F.C.C. 2d 399 (1976).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1), the Court having granted and consolidated the various petitions for a writ of certiorari in this review on October 2, 1978.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments are set forth at the end of the brief. The pertinent statutory provisions are set

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1/ Appendix citations in this brief are to the Federal Communications Commission's "Petitioners Appendix" submitted with its petition for writ of certiorari in No. 77-1575, docketed May 4, 1978, certiorari granted October 2, 1978, 42 U.S.L.W. 3221, and consolidated with this case. The FCC appendix is divided alphabetically into parts A-F and therefore all references will be to "App." followed by the lettered part and page.

forth at App. E, pp. 209-211. The pertinent regulations are set forth at 47 C.F.R. 76.252 et seq. and App. B, pp. 168-176; App. C, pp. 202-203.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to promulgate rules requiring certain cable television systems (1) to have the capacity to provide at least 20 channels; (2) to provide access to third parties on channels or parts of channels not being used by the system for its regular services, and (3) to make available certain equipment and facilities to those third parties.

2. If so, whether such rules are consistent with the First and Fifth Amendments.

STATEMENT

The brief for the Federal Communications Commission and the United States sets forth a full history of the proceeding which led to Midwest Video's challenge to the channel capacity and access rules in the eighth circuit, and, ultimately, to this petition. The peti-

tioners in this case, No. 77-1662, The National Black Media Coalition, et al. (NBMC), adopt their characterization of the rules and the proceeding. However, the court of appeals opinion suffers from several misconceptions about the role of access in broadcasting and its evolution on cable systems. The eighth circuit apparently believed that the history of broadcast regulation was one of complete deference to licensee views (App. A., 29-30, 34-46, 55) and that the access system devised by the Commission is frivolous in comparison to the greater interest of the cable operator to be free of such restrictions in operating his business (App. A, 1-91 passim). Both perceptions suffer from historical inaccuracy. The circuit court misconceives the First Amendment and democratic values which the Communications Act seeks to forward. Therefore, as a preliminary matter petitioners will briefly review the regulatory context in which these access rules came about.

A. Efforts To Insure Access To Broadcasting.

Largely, the FCC's actions to achieve access have been to insure a diversity of views. Thus, the Commission often speaks of access in terms of diversity of ownership of broadcast stations and diversity of viewpoints on broadcast programs. But because of limitations on spectrum space, the number of persons who could speak or choose who could speak over the airwaves has always been limited.[2/] Thus, to one degree or another, the entire history of broadcast regulation by the government could be viewed as an attempt to overcome scarcity and expand access to not just

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2/ However, because of scarcity the selection of licensees or speakers under the Communications Act, there has always been the necessity to maintain strict fairness in which applicants were selected. See Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

ideas but speakers who might assert ideas. Initially the FCC, and its predecessor the Federal Radio Commission, focused on the allocation of frequencies and the selection of licensees. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-377 (1969); Federal Radio Commission v. Nelson Bros., 289 U.S. 266 (1933). Moreover, from the very inception of the Communications Act the Commission was faced with broadcast licensees who tried to foreclose access by arguing against the operation of additional stations in their service area, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), and by trying to exclude views, other than their own. Red Lion Broadcasting Co. v. FCC, supra. See also Brandywine-MainLine Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), cert. denied 412 U.S. 922. These attempts to thwart access were to be expected; afterall, Congress, when it enacted the Communications Act, "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic

domination in the broadcast field." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

The Commission has sought to lessen the monopolistic control of broadcasting by limiting the number of stations any-one person can hold as a public trustee. See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956);[3/] FCC v. National Citizens Committee for Broadcasting, ___ U.S. ___, 98 S. Ct. 2096 (1978). In the context of control of licenses the Commission has been guided by the access maxim that "the widest possible dissemination of information from diverse and antagonistic sources"[4/]

3/ Affirming, Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953); See also Duopoly Rules, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943) (barring common ownership of local broadcast stations in the same community, and requiring divestiture)

4/ Associated Press v. United States, 326 U.S. 1, 20 (1945).

is encompassed within the public interest standard of the Communications Act. FCC v. National Citizens Committee For Broadcasting, ___ U.S. at ___, 98 S. Ct. at 2107.

While overall the Commission has looked to licensees to provide the public with a variety of viewpoints, they have not been given complete discretion. The Fairness Doctrine, for example, requires that broadcasters adequately inform the public on controversial issues that the public considers to be of importance. Young Peoples Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938), Report On Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) A broadcaster's obligation to air opposing viewpoints extends to bearing the expense of their coverage if no other sponsor comes forward. Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

Licensees are required to survey the general public and community leaders throughout the three year period that they hold a license, to determine what the audience

believes to be the needs and problems of the service area, and to then initiate programming to meet those needs and problems. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976).[5/] Under certain circumstances, traditional First Amendment rights arise, and the public is then granted the right to speak for itself over-the-air. When someone is personally attacked on a broadcast, the individual attacked must be offered an opportunity to respond, either by himself or through a spokesperson. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968). Additionally, the Communications Act permits legally qualified candidates the use of a station, if the licensee has permitted

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5/ The public's right to hear extends not only to the licensee's obligation to broadcast diverse views on public issues and problems, but to attempts by radio licensees to alter their entertainment formats. Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc).

another candidate to be heard. 47 U.S.C. §315 (1972). On the other hand, the Commission has the discretion to foreclose access to individual speakers and on occasion it has done so. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). It is, however, currently considering whether practical means exist which would permit access by individual speakers to voice their views on public issues, free of licensee and Commission control. See Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communciations Act, 43 Fed. Reg. 9201 (1978).

Repeatedly, the Commission has been required to act, to insure that licensees would be free to respond to diverse public views. For example, network monopolization of programming, first in radio, National Broadcasting Corp. v. United States, 319 U.S. 190 (1943), and then in television, Mt. Mansfield Television, Inc. v. FCC, 422 F.2d 470 (2d Cir. 1971), has been the subject of lengthy proceedings in an effort to preserve licensee freedom to

independently program for the assigned service areas.[6/]

B. Efforts To Preserve Access On Cable Television Systems.

Cable technology is capable, unlike over-the-air broadcast stations, of performing both broadcast and common carrier functions. Coaxial cable's initial commercial use has been to carry through cable existing television and radio stations to subscribers.[7/] See United States v. Southwestern Cable Co., 392 U.S. 157 (1968). While a cable system

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6/ The problem has been complex and reoccurring. See Notice of Inquiry: Commercial Television Network Practices And The Ability of Station Licensees to Service the Public Interest, 42 Fed. Reg. 4991 (1977) (Inquiry regarding acquisition and distribution of programming); See also Notice of Inquiry on the Airing of Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37725 (1978).

7/ Cable, but not coaxial cable which came into use about 1934 and was the first cable that could carry television signals, has long been used in broadcasting. In 1893, it was used to provide a commercial broadcasting system in Budapest, Hungary. The system transmitted music and news

(cont. on next page)

has the capability of bringing to subscribers many more television signals than currently exist in any community in the country, it also has the ability to originate programming to be distributed to subscribers. United States v. Midwest Video Corp., 406 U.S. 649 (1972). Cable technology, unlike over-the-air broadcasting, is capable of transmitting simultaneously literally dozens of aural and video signals.[8/] However, multiple channel systems do not insure that more people will be heard or that more ideas will be examined. Cable

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7/ (cont. from previous page) programming to residences twelve hours per day. In this country similar hook-ups of cable provided church services and special events to subscribers. The Chicago Telephone Company, in the election of 1884, broadcast Congressional and election returns to over 15,000 listeners. See L. Lichty & M. Topping, American Broadcasting, A Sourcebook On the History of Radio and Television, at 17-18 (1972).

8/ Practically speaking, most new systems being built plan on having initially available about 30 channels. Brown, "Knickerbocker Given Cable-TV Franchise for Queens" The New York Times, November 7, 1978 at 91.

systems are natural monopolies within their service areas, and, because of this, it could lead to an even greater concentration of power than exists in broadcast television. "When a single cable operator has the power to control the programming and information content of all the channels on his system, his monopoly power over the cable medium of expression is nearly absolute."9/

As it has in broadcasting, the Commission has sought to remove possible restraints on the growth and diverse ownership of cable by restraining monopolistic practices that would restrain its development. See General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971); General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969) cert. denied 396 U.S. 888. (Where the court reviewed

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9/ Cabinet Comm. On Cable Communications Report To The President, 12 (1974) See also First Report and Order, 20 F.C.C.2d 201, 222 n.27 (1969) (Docket No. 18397):
(cont. on next page)

the FCC's regulation of the competitive problems between telphone companies that offer cable service and other entities providing cable service.)[10/] The Commission has also acted to insure that the television networks would not dominate cable ownership. See Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971).

9/ (cont. from previous page) cable television's operations have developed on a non-competitive, monopolistic basis in the particular areas served with no instance, to our knowledge, where a member of the public subscribes to more than one cable television service.

10/ The Congress has also acted to protect cable development when a system is faced with problems in bargaining over rates, terms and conditions for pole attachments, usually with or electric companies for the use of their poles. The Commission is given the jurisdiction, if not exercised by the individual states, to insure that such rates are just and reasonable. 47 U.S.C. §224 (1978); Pub. L. 95-234, 92 stat. 33 §6 (February 21, 1978). The Commission is currently acting to set rules to govern this problem. Notice of Proposed Rule Making, Adoption of Rules

(cont. on next page.)

Additionally, the Commission has sought to facilitate the transfer of over-the-air television signals to cable systems, and the movement of programming that a cable system originates, by the allocating of microwave and satellite frequencies for cable system use. Each kind of signal expands a cable system's access to programming.11/

10/ (cont. from previous page) for the Regulation of Cable Television Pole Attachments, 43 Fed. Reg. 19886 (1978).

11/ The first microwave frequencies, for distribution of television signals to cable systems, were allocated in 1965. First Report and Order (CARS), 1 F.C.C. 2d 897 (1965) Later, frequencies were allocated to allow systems to relay programming material the cable system originated and wanted to transport for use within the system. Report and Order in Docket 17999 (LDS), 20 F.C.C. 2d 422 (1969); Report and Order in Docket 18452, 20 F.C.C. 2d 415 (1969). Then the available frequencies were expanded again, to aid cable systems to expand and grow in large cities, and to permit low cost expansion to rural and suburban areas, without the use of costly cable to connect the adjacent areas to the central system. Report and Order in Docket 18397, (cont. on next page)

Prohibitions which limited cable systems access to feature films and sports events for pay cable have also come under scrutiny and have been set aside, in part, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829, and, ultimately deleted by the Commission. Order in Docket 19554, 42 Fed. Reg. 64348 (1977)[12/] In short, similar measures

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11/ 36 F.C.C. 2d 141 (1972); Report and Order in Docket 20363, 54 F.C.C. 2d 207 (1975). Further consideration is currently being given to allocating even more spectrum space to facilitate the transfer of programming for cable systems. Notice of Proposed Rule Making and Notice of Inquiry (To Expand the Frequencies Available for Use by Cable Television Relay Service), 43 Fed. Reg. 9500 (1978). Satellites are also being used to transport programmming to cable systems. See 47 C.F.R. §§25.103, 25.202. There will be, (cont. on next page)

12/ Review is currently being sought of the Commission's refusal to reconsider its rules restraining the carriage television of distant signals. Geller v. FCC, No. 77-1093 (D.C. Cir. filed January 19, 1977, argued February 23, 1978).

to those taken by the Commission to assist broadcasters in serving the public interest have also been taken to assist cable systems.

Cable systems that originate programs must provide, like over-the-air television, a right of reply to a person attacked, time to opposing candidates for public office, and comply with the Fairness Doctrine. 47 C.F.R. §§76.205, 76.209 (1977). In addition, a cable system cannot refuse to carry a local television signal. 47 C.F.R. §§76.59-76.63 (1977).

11/ (cont. from previous page) it is estimated, 450 satellite earth stations serving cable systems by the end of the year, which will amount to nearly two-thirds of all available earth stations. Satellites will provide cable with a more reliable, less costly means of program distribution and it will greatly expand the programming offered. McDowell, "To Cable TV Industry, Picture Is Bright," The New York Times, May 4, 1978, p. 47.

The access and channel capacity rules that are before the Court essentially deal with the same diversity problem the Commission has faced in broadcasting, but within the technical context of cable television, namely, a single licensee's control of a scarce frequency. A cable operator could potentially control access to all of the channels that are available to his subscribers, not just one outlet as is the case in broadcasting. Moreover, he can keep the number of channels available artificially low to increase scarcity and decrease access. In other words, the very attributes of technological and economic abundance which the Commission sought to foster through permitting cable systems to carry television signals and to use microwave frequencies, would be foreclosed.13/

When the amended rules, under consideration in this case, were

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13/ See Midwest Television Inc., 15 F.C.C. 2d 84 (1968).

first issued in 1972, the Commission sought through the channel capacity and non-broadcast channel requirement to "measure cable's technological promise, assess its role in our nationwide scheme of communications, and learn how to serve the public." Cable Television Report and Order in Docket 18397, et al., 36 F.C.C. 2d 141, 189 (1972) At that time the Commission stated its goal as follows:

> We envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals. We note 40, 50, and 60 channel systems are currently being installed in some communities. The cost difference between building a 12 channel system and a 20 channel system would not appear to be substantial.
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> * * *
>
> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by

> cable -- the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments. Id. at 190.

The current rules before the Court adjust this original view to what the Commission believes to be a more realistic goal in light of four years experience, but the premise is the same.

Time has established that access users range from pay cable entrepreneurs (who lease channels, often install converters, and program entertainment) to individuals who want to communicate their views on public issues on the public access channel.[14/]

14/ Often, public access programming has been uniquely local, portraying housing issues, joblessness and the increase in crime in the very community where those viewers live and work. The users on public access programs have raised immediate community concerns, such

(cont. on next page)

Thus, cable access is well within traditional Commission actions, but in a mode and manner unique to cable television. Moreover, access has thus far fostered the very First Amendment ideals that the Commission has sought to further in the electronic media, and it has furthered the democratic ideals which broadcast licensing has never fully permitted.15/

14/ (cont. from previous page) as the need for a traffic light. D. Othmer, The Wired Island, 6 (1973). They have provided an educational basis for viewers who wish to know more about schizophrenia, or how to find an apartment in that community. Id. at 7. Users have also provided minorities with programs oriented towards their specific needs and interests. R. Kletter, Cable Television: Making Access Effective, 35 (1973). Most users of public access channels fall into three basic categories: "organizations established for the specific purpose of producing for, and developing users of, public access; existing organizations which use public access as an additional way of reaching their audience, and occasional individual users." The Wired Island, at 8.

15/ See Bollinger, Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media, 75 MICH. L. REV. 1, 27 (1976).

SUMMARY OF ARGUMENT

Cable television provides a means of carrying to home subscribers a "spectrum" of electronically transmitted services -- broadcast programming and a variety of other services such as devices to monitor home security and transmission of computerized data for businesses. The basis of its economic support has been, from its inception, the transmitting of television station signals, both those that exist in the community where service is offered, and those from other communities too distant for the viewer to receive without the assistance of the cable system.

Cable systems present the possibility of assisting and hampering the FCC in acheiving the Congressionally mandated goal of a diverse national communiations system that serves all the people. Southwestern Cable Co., supra; United States v. Midwest Video Corp., supra Because cable systems are interstate communications regulated under the Communications Act (47 U.S.C. §§151, 152(a); 153(a), (b)), and because they

rely for their economic support on existing television signals, this Court in Midwest Video concurred in the Commission's determination that "CATV systems, no less than broadcast stations, . . . may enhance as well as impair the appropriate provision of broadcast services." 406 U.S. at 664-665 (plurality opinion). There, the Chief Justice stated that "[T]he essence of the matter is that when [cable systems] interrupt the signal and put it into their own use for profit, they take on burdens . . ." 406 U.S. at 666 (Burger, J. concurring opinion).

In this case, the access and minimum channel regulations impose such a burden, but they are requirements premised on enhancing speech by increasing the number of voices that can participate in public debate. The minimum channel requirements remove the possibility of a cable system maintaining artificial scarcity in its service area, where it always enjoys a monopoly granted by local governments. The access channel requirements are a relatively low cost means

of permitting members of the community, the government, and the schools to better serve the common weal. Moreover, leased access provisions assist the system operator in the development of new commercially supported services such as pay programming. The regulations are a reasonable means of achieving diversity, well within traditional Communication's goals. Moreover, the Commission measured the validity of the rules against the economic cost of their provision. Most importantly, it relieves the suppression of First Amendment values that results from the limited and stifling system of broadcast licensing.

It will be argued in this case by the respondent, Midwest Video, that the regulations curtail its First Amendment rights in deference to the public's. This assertion is inaccurate, however, within the context of a cable television system's overall business. Cable, both in practice, and under the Commission's rules, offers not just one channel of service, but a whole spectrum of service. The operator of a system exercises no

editorial discretion over the television signals; the Commission's rules prohibit such an action. Moreover, even the choice of signals is carefully circumscribed by complex formulas. The system operator's role is to deliver as full a compliment of signals as is possible. Albeit, he can initiate programming, but that function is now within his discretion and these rules do not take from that discretion or regulate it in any manner. The First Amendment rights pointed to by the court below do not arise in this case. They are rights which the court of appeals identified not from assessing this record, but through analogy to those found in other cases based on other factual circumstances. We do not view the cable operator as having no First Amendment rights; his rights are the equal of everyone elses. But, in this case, his right to be free to speak has not been infringed.

ARGUMENT

I. THE COMMUNICATIONS ACT GRANTS THE FCC BROAD JURISDICTION TO REGULATE INTERSTATE COMMUNICATIONS TO SERVE THE END OF DIVERSITY.

A. The Communications Act Grants The FCC Authority To Promulgate The Challenged Cable Television Regulations.

The court of appeals concluded that cable television was not within the jurisdictional ambit of the Communications Act because cable systems were neither broadcast stations within Title III of the Act, nor were they common carriers within Title II of the Act. (App. A 5-6, 20-24) In the view of court of appeals, because cable systems do not come within the provisions of those titles, they escape the Act's grasp, unless, it is necessary to reach their activities because of the danger they pose to or the similarity the requirement has with broadcast television. This view, we believe, is inconsistent with this Court's reading of the Communication's Act in United States v. Southwestern Cable Co., supra. and United States v. Midwest Video Corp., supra.

In both of those cases the Court reviewed the scope of the Commission's general authority. In Southwestern the Court found the provisions

of the Act to be "explicitly applicable" to cable television. 392 U.S. at 167. The Southwestern Court specifically considered and rejected the eighth circuit's premise that because cable television is neither a common carrier nor a broadcast station it escapes the grasp of the Commission's jurisdiction. 392 U.S. at 172.

Moreover, the Court made clear in Southwestern that cable was communications within Section 3(a) and (b) of the Act, 47 U.S.C. §153(a), (b), and, that it is within the Commission's general authority granted in Section 2(a), 47 U.S.C. §152(a) (App. E, 209) and subject to the mandate of Section 1, 47 U.S.C. §151 (App. E, 209), to serve the Nation's communications needs. These "general terms amply suffice," the Southwestern Court held, to subject cable system operations to regulation. 392 U.S. at 168.

The Southwestern Court emphasized that Congress intended, and its opinions had always found, that the Act purposely granted to the Commission

broad authority and a comprehensive mandate to flexibly handle the dynamic changes in communications. 392 U.S. at 172-173.[16/]

Thus, the court of appeals misinterpreted the scope of the Commission's power over all interstate communications by limiting that power to essentially broadcast radio and television and communications common carriers. This flawed view resulted in an improper testing of the validity of the access regulations.

B. The Access, Minimum Channel, And Equipment Requirements Are A Reasonable Exercise Of The Commission's Authority.

In both Southwestern and Midwest Video, the Court tested the reasonableness of the Commission's exercise of its jurisdiction on the basis of whether it was necessary "to

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16/ The Court cited its earlier holdings in National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

perform with appropriate effectiveness certain of its other responsibilities." Southwestern, supra. 392 U.S. at 173. Only if there is "compelling evidence" that the Commission's regulation is not within Congress' intention, the Court stated, quoting from Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968), will the court "prohibit administrative action imperative for the acheivement of an agency's ultimate purposes." Id. at 177.

The court of appeals is not clear why the objectives the Commission rested on are prohibited but, apparently, the lower court believed that only if the regulations governed a "deleterious interrelationship of cable systems to broadcasting" or if they "require that cable systems do what broadcasters do" could they be valid. (App. A, 28). The court of appeals concluded that the objectives pointed to by the Commission's did not fit the above objectives and that they were not in the statute but were of the Commission own making. (App. A. 32-39). It also stated that there is no established need for the regulations

(App. A. 46-48). Overall, the court gave no weight to this Court's view in Southwestern and Midwest Video that the same objectives as those asserted here were legitimate Commission goals.

Briefly, the Commission's rules provide:

> a.) That cable systems with 3500 or more subscribers must provide at least twenty channels. Newly constructed systems must comply when built, and existing systems by 1986. 47 C.F.R. §76.252 (1976).
>
> b.) That the channels must be made available to the public, the government, schools, and commercial lessees under various circumstances depending upon demand, the time sought, and the other services being offered on the system. 47 C.F.R. §76.254(a) (1976).
>
> c.) That basic equipment must be made available to public access users to produce programs. 47 C.F.R. §76.256(a) (1976).

These requirements, like the origination requirement reviewed in Midwest Video, were imposed because the basic economic support for cable is the carriage of television and radio signals. Cable Television Report and Order in Docket 18397, supra., 36 F.C.C.

2d at 190; Midwest Video, supra, 406 U.S. at 664-665 (plurality). See also Southwestern, supra, 392 U.S. at 173-177.

The court of appeals is incorrect when it holds that the Commission did not tie its objectives to the Act. As with the former origination requirement, the

> . . . goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the Act . . .), both those who are cable viewers and those dependent on off the air service. The new rules . . . are the minimum measures . . . to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth the television broadcast service. Second Report and Order, 2 F.C.C. 2d 725, 745-46 (1966), quoted in Midwest Video, supra, 406 U.S. at 666.

See also Southwestern, supra, 392 U.S. at 174-75.[17/]

Similarly, this Court agreed that cable systems could properly facilitate the Commission's mandate "to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities . . .," as is required by Section 307(b) of the Act, 47 U.S.C. §307(b) (1977). Midwest Video, supra., 406 U.S. at 670.

17/ The Commission stated in its Order (App. B. 98) here:

> First, we continued to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication . . . [W]e believe they can . . . result in the opening of new

(cont. on next page)

The court of appeals simply failed to read the Commission's orders here in light of Secs. 1, 303(g) and 307(b) of the Act. It gave no recognition to the past policies implementing those sections, which this Court previously found to be relevant to the supplementary nature of the Commission's cable regulations.[18]

17/ (cont. from previous page)

> outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.

18/ The failure of the court below to fully grasp the long regulatory history underlying the Commission's objectives, is no better illustrated than by its view that these objectives were (cont. on next page)

The further arguments put forth by the court for holding the regulations impermissible: that they improperly seek to regulate cable as if it were a common carrier, and that the access regulations would be illegal if promulgated for broadcast licensees, are plainly incorrect. Cable systems have, as this Court has noted, characteristics of both broadcast stations and common carriers. The Commission, in

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18/ (cont. from previous page) of the Commission's "own design" (App. A. 33), that the Commission's goals were, "attractive euphemisms" (App. A. 35), and that the Commission was acting as if it were the "Federal First Amendment Commission." (App. A. 39). For example, the court of appeals stated that it was aware of "nothing in the Act . . . which places with the Commission an affirmative duty or power to advance First Amendment goals." (App. A. 39) Compare the contrary view of this Court in FCC v. National Citizens Committee for Broadcasting, supra., ___U.S. at___, 98 S. Ct. at 2112; Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 122 (1973).

regulating cable, has repeatedly recognized this unique technical facility. Moreover, just as the Commission has refrained from treating cable television as solely a common carrier,[19/] it has, similarly, refrained from regulating cable systems as television broadcasters.

Within the Commission's view, cable systems must, for example, carry local television signals which is essentially a common carrier function. See Midwest Video, supra., 406 U.S. at 659, n.17, where this Court noted that the court of appeals had correctly upheld this form of regulation.

However, it need not be decided in this case whether cable systems should be regulated as common carriers, for the issue here is not whether the access regulations are common carrier regulations, but whether the Commission's authority over cable systems permits such regulations. This Court has already

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19/ See American Civil Liberties Union v. FCC, 523 F.2d 1344, (9th Cir. 1975); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966).

indicated that such regulations would be valid if promulgated for broadcast licensees. CBS v. Democratic National Comm., supra. Moreover, the Court noted in the CBS case that while the First Amendment neither commanded nor prohibited an access scheme on broadcast stations, the Commission has as an exercise of its discretion implemented access channels on cable systems.[20/] 412 U.S. at 131; See also Midwest Video, supra., 406 U.S. at 654, n.8.

Finally it might well be argued that the access and channel requirements are more consistent with cable television's basic role, that of an entity retransmitting television signals, than the origination rule upheld in Midwest Video. Clearly, these rules coincide even with the dissent's view of a proper requirement to be imposed on CATV. 406 U.S. at 677-681 (Douglas, J., dissenting).

20/ Moreover, this Court gave no indication in CBS, as the court of appeals indicates, that properly promulgated access regulations were prohibited by Section 3(h) of the Act, 47 U.S.C. §153(h), which provides that broadcasters are not subject to common carrier regulation.

C. The Regulations Are A Rational Exercise Of The Commission's Authority And Are Based On A Consideration Of The Relevant Factors.

The eighth circuit opinion also suggests that the rules are unwise. The court believes them to be unduly burdensome (App. A.44-50) and unwarranted because of the lack of demand for access services (App. A. 86). While neither point goes to the Commission's jurisdiction, but instead, attack the reasonableness of the rules, the court is quite clearly substituting its judgment for the Commission's when it makes these assertions. Both points were extensively considered by the Commission, which concluded that the requirements were not burdensome and that the rules would fulfill long sought objectives.

The Commission weighed the public benefits "against the costs the requirements impose" (App. B. 98). Actual statistical costs of compliance were measured (App. B. 114-115), and reference was made to previous evaluations setting similar access standards (App. B. 113, 119) with regard to all facets of the

rules: channel capacity, access production, and channel designations. Only on the basis of this evaluation were modifications then made to the 1972 rules (App. B. 139).

Admittedly, the Commission was not able to exactly measure demand but this Court has held that ". . . complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deduction based on the expert knowledge of the agency.' Federal Power Commission v. Transcontinental Pipeline Corp., 365 U.S. 1, 29 . . . (1961) . . ." FCC v. National Citizens Committee for Broadcasting, supra., ___ U.S. at ___, 98 S. Ct. at 2122.

II. ON THE RECORD OF THIS CASE, THE FIRST AMENDMENT DOES NOT PROHIBIT THE ACCESS, MINIMUM CHANNEL AND EQUIPMENT REQUIREMENTS.

In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101-114 (1973), the Court held that the First Amendment did not require that speakers who wanted to voice editorial advertisements receive access to broadcast stations. The question of access to broadcast stations under the Communications Act, the Court held, was left to the Commission's discretion in carrying out its administration of the public interest standard. Id. at 121-132.[21/] The choice ultimately would be one of practicality and desirability;

21/ "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation . . . . [I]n Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" CBS, supra. 412 U.S. at 101.

for example, the Court noted

> . . . In its proposed rules on cable television the Commission has provided that cable systems in major television markets "shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed. Reg. 3289, §76.251(a)(4).

It is this example used by the Court in CBS that is the focus of the First Amendment issue in this case. The court of appeals held that access was prohibited not only by a lack FCC jurisdiction, but that alternatively access is prohibited by the First Amendment to the Constitution. The issue was not, of course, decided in the CBS case, but the course to petitioners seems clear. While the First Amendment does not re-

quire access in the context raised in that case, it does not prohibit access in this case.

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 386. In radio and television broadcasting the government chooses the speaker or licensee who in turn might select others to speak over his outlet. Government licensing and regulation of the broadcast media is permissible because broadcast frequencies are a scarce resource,[22/] and, under limited circumstances where indecent language is found, because broadcast programming has an "uniquely pervasive presence"[23/] unlike other forms of media. While the public's right is "paramount" in broadcasting, Red Lion, supra, it is not

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22/ National Broadcasting Co. v. United States, supra, 319 U.S. at 212-213.

23/ FCC v. Pacifica Foundation, ___ U.S. ___, 98 S. Ct. 3026, 3040 (1968).

absolute, and must often be considered in light of such factors as a broadcaster's "journalistic discretion." CBS, supra. Moreover, the traditional First Amendment values which have been found to be paramount in assessing the rights of the print media have, when applied to the electronic media, been outweighed by an end that would promote a diversity of expression. FCC v. National Citizens Committee for Broadcasting, supra, ___ U.S. at ___, 98 S. Ct. at 2114; Red Lion Broadcasting Co., supra.

The court of appeals rejected the foregoing constitutional analysis applied in above broadcasting cases in deference to one applied to newspapers in such cases as Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), where a state directed right of reply to newspaper political views was rejected as being contrary to the First Amendment.[24/]

24/ The court of appeals assumes that cable television is a media entity; although it earlier concluded
(cont. on next page)

The difference is, however, of little significance in this case, since the cable access requirements do not raise the First Amendment values which the court of appeals found to be abridged.

First Amendment rights or values should, of course, be no different for broadcasters than for cable operators, newspapers, or the person in the street.[25/] It is only when those rights conflict with other Constitutional rights or societal values that an assessment of

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24/ (cont. from previous page) that a cable system's business was that of a passive retransmitter of television signals, without public interest obligations, (App. A. 39-42, 46-50) citing, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). The issue as to whether a cable system is a media entity might be a thorny one in some contexts, but the following discussion will demonstrate, it is not of decisional significance here.

25/ See First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S. Ct. 3126 (1978).

First Amendment gains and losses must be made; this is not that case.[26] Here, the court of appeals found the access rules[27] to violate the First Amendment rights of cable operators because: 1.) the rules act as a prior restraint on his right to speak on the channels used for access (App. A. 67); 2.) access regulation enlarges government control over content (App. A. 68); 3.) access withdraws the operator's editorial discretion (App A. 71, 73); 4.) the rules fail to permit the operator to control quality (App. A. 73); 5.) the rules force the operator to enforce government obsenity restrictions (App. A. 75,76); and, 6.) access may injure the system financially by angering viewers (App. A. 79). Additionally, the eighth circuit

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26/ See A. Meiklejohn, Political Freedom, 24-48 (1960) (Rules restricting speech do not necessarily abridge freedom of speech.)

27/ The court voiced no view about the minimum channel rules which grant no right to any speaker but only insure the technical capacity for speakers.

finds that the rules chill the rights of access users by subjecting them to obscenity restrictions administered by the operator (App. A. 75, 76) and that access because of its uncontrolled content would intrude on the rights of viewers to be free of the potential for offensive programming (App. A. 79-80).

The assessment of the above infringements are premised on a misconception about cable system operations. The court makes this fundamental error by relying on factual analogies to rights that arise in the operation of radio stations or newspapers. For example, the physical limits of radio spectrum are not the limitations of cable; nor does cable service center on journalism like newspapers. Cable systems primarily retransmit existing television signals, over which they have none of the content controls the court of appeals finds infringed here. While cable systems have some say about the distant television signals they carry, they must carry all local signals. 47 C.F.R. §§76.59-63 (1977). In fact,

the Commission's rules determine, under some circumstances, even which programs can be shown. The business of cable television is not broadcasting, or journalism, but the sale of television signals.[28/] Unlike broadcasters, who only have a small part of the spectrum to use, cable systems offer their subscribers a whole spectrum of communications services. Cable systems offer multiple channels of television, automatic services such as

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28/ The Commission's definition of cable makes this amply clear (47 C.F.R. §76.-56(a)):

> Cable television system. A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only sub-

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burglar alarm hookups, stock reports, time and weather information. Subscribers, it is believed, "hook-up" to the cable just because it provides this spectrum. Even pay programming is sold by distributors in package form, over which the system exercises no editorial discretion. Admittedly, a system operator might choose to initiate programming on his own, but then the speech rights, which might arise would be different than the facts presented in this case. Additionally, content is wholly controlled by the access user.[29] Nor is access

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28/ (cont. from previous page)

scribers in one or more multiple unit dwellings under common ownership, control, or management.

29/ The circuit court's arguments with regard to obscentiy review by the operator and the chilling effect it might have to the access user, were made by the court before the Commission sought and obtained remand of a case in the D.C. Circuit where those provisions were at issue. ACLU v. FCC, No. 76-1695 (D.C. Cir. remanded August 26, 1977) The Commission

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more intrusive to the viewer than broadcasting. Viewers will, in fact, be told that access channels are not broadcast channels and they can easily avoid any possible intrusion.

Finally, the court indicated that access might injure the operator financially, because he would have to pay for the channels and provide equipment under same circumstances, and because the programming might anger viewers, creating a loss of subscribers. The record in this proceeding simply fails to establish the first claim, and the second, fails to understand that the subscriber is buying channels and the more channels that are active with programming the more he has to sell.30/

29/ (cont. from previous page) has indicated to the court that it intends to repeal the rule, which required the system operator to inforce obscenity regulations, and presumably, such an action would moot the issue in this case.

30/ See B. Schmidt, Freedom Of The Press vs. Public Access, 213 (1976):

> [T]he First Amendment "costs" of access in the context of
> (cont. on next page)

In any event, the possibility for restraint of speech here is not analogous to Miami Hearld Publishing Co. v. Tornillo, supra. There, the newspaper was required to permit a response to its political views. The Court in Miami Hearld found that the statute at issue would have a chilling effect on the presentation of controversial material about public figures. Id. at 256-258. Unlike here, the statute in Miami Hearld would have resulted in an overall diminution of diversity.

Petitioners urge that there are no analogies to be drawn in this case to either broadcast stations or newspapers. Cable systems provide channels, and if the system operator chooses to speak

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30/ (cont. from previous page)

> traditional broadcasting -- chilling effects, invasion of editorial responsibility, imposition on a mass audience "earned" by the broadcaster -- are negligible for special access channels in a cable television system.

like a broadcaster or publisher, only then do his First Amendment rights arise. In such an event, they must be judged in the context of his undertaking, and subjected to the same balancing as any other speaker.31/

31/ The D.C. Circuit has indicated that if valid First Amendment claims arise with regard to cable they would present state action questions, since cable systems are franchised by local governments and enjoy state enforced monopolies. See Home Box Office, Inc. v. FCC, supra, 567 F.2d at 46 n.82.

> Alternatively, local government involvement in the franchise and regulation of cable television, see Promise Versus Performance, supra note 30, at 20-23, might make cable owners "the state" for constitutional purposes, thus subjecting them to First Amendment scrutiny. Cf. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974); T. Emerson, supra note 76, at 663. Again, this question cannot be resolved on the record before us.

CONCLUSION

For the foregoing reasons,[32/] Respondent, NBMC, et al. respectfully requests this Court to reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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32/ The petitioner in this case has not briefed the additional question surrounding the Fifth Amendment. Petitioner joins in the FCC's defense of that issue.

Counsel wish to acknowledge the assistance in the preparation of this brief of Citizens Communications Center legal intern, Judith St. Ledger-Roty.

APPENDIX

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.